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Pro-Choice Network of Western New York, et. al. v. Schenck, et. al., 67 F.3d 377 (2d Cir. 1995)

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Pro-Choice Network of Western New York, *et. al.* v. Schenck, *et. al.*

United States Court of Appeals for the Second Circuit
67 F.3d 377 (N.Y. 1995)

On September 28, 1995, the United States Court of Appeals, Second Circuit, convened *en banc* to rehear petitioner's arguments regarding two provisions of district court Judge Arcara's preliminary injunction designed to restrict radical anti-abortion protest tactics. The two contested provisions were: 1) anti-abortion protesters must place a fifteen foot buffer zone between themselves and those people entering and exiting the medical facility being protested, as well as a fifteen foot buffer between themselves and the building entrances, driveways, and vehicles entering or exiting the premises; and, 2) anti-abortion protesters may sidewalk counsel (offer alternatives to abortion) in pairs only and must "cease and desist" their sidewalk counseling when a patient indicates they wish to be left alone.

The Second Circuit Court of Appeals found 13-2 for the petitioner, Pro-Choice Network, holding that the inclusion of the two contested preliminary injunction provisions: 1) were necessary to further significant government interests; and, 2) burdened no more speech than was necessary.

The anti-abortion protesters argued that these provisions impinged upon their constitutional right to freedom of speech. In contrast, the pro-choice advocates argued that the provisions appropriately balanced the constitutional rights of patients and staff at these medical facilities while not unnecessarily burdening the speech of anti-abortion protesters who could still voice their opinions within the guidelines of the injunction.

The court of appeals looked to the United States Supreme Court's decision in *Madsen v. Women's Health Center, Inc.*, __ U.S. __, 114 S.Ct. 2516, 129 L.Ed.2d. 593, *reh'g denied*, __ U.S. ___, 115 S.Ct. 23, 129 L.Ed.2d. 922 (1994) for the appropriate standard to evaluate the constitutionality of the injunction. The *Madsen* case, decided after the district court decision, held that a more stringent test of constitutionality is appropriate when an injunction rather than a statute is at issue. Thus the traditional test applied to content-neutral regulations of time, place, and manner of expression was rejected by the *Madsen* Court for injunctions. In its place, the Supreme Court stated that the test for injunctions is whether they "burden no more speech than necessary to serve a significant government interest." 114 S.Ct. at 2525.

Under both the traditional and the new *Madsen* tests, the question whether the regulation or injunction is content-neutral is a threshold issue. An injunction will be found not to be content-neutral if it makes "reference to the content of the regulated speech." *Ward v. Rock Against Racism*, 491 U.S. 781, 791, reh'g denied, 492 U.S. 937 (1989). The *en banc* court of appeals, drawing an analogy with *Madsen*, concluded that the preliminary injunction was in fact content-neutral. "In the instant case, as in Madsen, the injunction's purpose is both content- and viewpoint-neutral: the court imposed restrictions on the demonstrators not to suppress their anti-abortion message but 'incidental to their antiabortion message because they repeatedly violated the court's original order.'"

Applying the *Madsen* test, the court of appeals examined the three significant governmental interests that were identified by the district court and found that these interests closely approximated the significant governmental interests noted in *Madsen*. The first interest involved the need for the government to ensure the maximum medical safety for the patient undergoing an abortion procedure. Additionally, there was a government interest in protecting the safety of the public from traffic or crowd control problems near clinics during protests. The third interest, access to abortions, was grounded in the "woman's freedom to seek lawful medical or counseling services."

Having determined that there were three significant government interests at stake, the court of appeals next turned to the question of whether the contested provisions of the injunction "burdened more speech than necessary." First, the court found that the fifteen foot buffer zone provision was narrowly tailored to protect the government interests concerning access to abortions and ensuring medical safety for clients, while not impeding the free speech of the protestors. The court relied on the findings of the district court that harassment from the protesters' close range tactics produced negative effects on the health and well-being of patients, as well as interfered with the normal functioning of the clinic.

Next, the court turned to the "cease and desist" provision, distinguishing this provision from a similar one ruled unconstitutional in the *Madsen* case. In *Madsen*, the provision at issue did not allow protesters to approach patients within three hundred feet of the clinic unless the patient initiated the communication. In the case at bar, however, the "cease and desist" provision enabled protesters to initiate counseling with patients even within the fifteen feet buffer zone unless or until the patient affirmatively rejected such communication. Thus, the court of appeals upheld the provision, finding that it did not unnecessarily burden the speech of the protesters.

On October 2, 1995, the United States Supreme Court denied certiorari. The impact of this case is that future anti-abortion protesters must maintain a fifteen foot buffer zone between themselves and clinic patients, staff, and facilities, as well as cease and desist from sidewalk counseling when a patient indicates her wish to be left alone.

- submitted by Jessica Murphy